No. 374.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

ANDREW J. MOLONEY,
Petitioner,

vs.

MARJORIE H. MOLONEY (AILWORTH),
Respondent.

SUGGESTION AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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JURISDICTION.

It is respectfully submitted that this Honorable Court should not entertain the petition herein for the following reasons:

(1) No constitutional question is presented for review as the opinion of the Supreme Court of Kansas on the second appeal specifically states that the court on the first appeal disposed of the constitutional issue of full faith and credit, specifically Transcript, page 41:

> "Touching the final decree of the Missouri court we held on the first appeal in the habeas corpus case: 'Held, the final decree of the foreign court was entitled to full faith and credit and the mother, having

> invoked its jurisdiction for the purpose of having the custody of the children determined by such court, cannot assert that such foreign court lost jurisdiction of the children by reason of their having been brought to Kansas prior to the issuance of the final custody decree by the foreign court.' "

(2) The opinion of the Supreme Court afforded full faith and credit to the Missouri decree to the date of its rendition, September 12, 1946, Transcript, page 26:

> "The judgment of the district court is reversed with instructions to set aside the ruling sustaining the demurrer and to hear any proper evidence which may be offered by the respective parties relative to the conditions which may **be offered by the respective parties relative to the conditions which may** have changed subsequent to September 12, 1946, and pertaining to the best interests of the children insofar as their present and future welfare is concerned."

(3) The petitioner asked the trial court to consider the welfare of the children in determining the issue of custody and invited the judgment of the court on that issue. See Transcript, page 4:

> "(7) The plaintiff herein is the father and proper person to have the care, custody and control of said minor children and that the defendant herein is unfit to have said care, custody and control."

That issue presented a question of fact to be determined and is not subject to review by this Honorable Court.

(4) The period of time in which a change of circumstances affecting the welfare of the children may be shown is a question of fact and affords no ground of jurisdiction to this Court. If this Court would have jurisdiction, that period was not thirty-four days but was the period from

the 12th day of September, 1946, to the date of the trial, March 12, 1948. See Transcript, page 30, and Roll v. Roll, 143 Kan. 704, where it was held:

> "In a habeas corpus action for the custody of a minor child, the welfare of the child at the time of the hearing not at some former time is a decisive factor in the action."

(5) The Supreme Court of Kansas determined the issue proper under the case of State of New York v. Halvey, 330 U. S. 610, 67 S. Ct. 903.

CONCLUSION.

Respondent urges that no constitutional question is involved, and that the only matter presented is one of fact submitted by the petition which was properly determined, and that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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